IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

MAYA GARIBY, a minor, by and through her court-appointed guardian, ROBERT FLEMING, Plaintiff/Appellant, v. EVENFLO COMPANY, INC. Defendant/Appellee.	)	2 CA-CV 2011-0081 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C20074296

Honorable Kenneth Lee, Judge

AFFIRMED

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and

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B R A M M E R, Judge.

¶1 Appellant Maya Gariby appeals from the trial court's grant of summary judgment in favor of appellee Evenflo Company, Inc. (Evenflo). Gariby was injured in a motor vehicle accident and was restrained at the time by a child safety seat manufactured by Gerry Baby Products, Co. (Gerry). Gariby argues the court erred in denying her request for production of documents associated with Evenflo's litigation in another case. Gariby also argues genuine issues of material fact as to Evenflo's duty to warn, as Gerry's successor, precluded the court from entering summary judgment against her. She further contends there were genuine issues of material fact as to whether Evenflo aided and abetted Gerry in concealing the child seat's dangers, whether Evenflo and Gerry conspired to conceal those dangers, and whether the special relationship between Evenflo and Gerry constituted a joint venture. We affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to the party against whom summary judgment was entered, drawing all justifiable inferences in its favor. *Modular Mining Sys., Inc. v. Jigsaw Techs., Inc.*, 221 Ariz. 515, ¶ 2, 212 P.3d 853, 855 (App.

2009). In 2002, Gariby was injured in a motor vehicle accident resulting in paraplegia. She was restrained at the time by a Double Guard model 675 child safety seat manufactured by Gerry. Gariby's mother was not the original owner of the child seat. When sold, the child seat came with multiple warning labels indicating it should not be used for children weighing less than forty pounds due to its design. One of the original labels was still affixed to the child seat Gariby used. Gariby was one year old and weighed less than forty pounds at the time of the accident.

¶3 Evenflo entered into an asset purchase agreement (APA) with Gerry in 1997. Pursuant to the APA, Evenflo acquired Gerry's assets but did not assume liability arising from products manufactured by Gerry. Evenflo agreed to administer warranty claims on Gerry's behalf for any non-products liability claims associated with products sold before April 21, 1997. Evenflo also purchased Gerry's inventory of component parts for the Double Guard seats. In the APA, Gerry agreed to indemnify Evenflo for damages arising from Double Guards shipped within sixteen months of the APA closing date provided Evenflo did not "recall, issue any safety advisory or take any other corrective action with respect to such products without the written consent of [Gerry]."

¶4 Gariby, through a court-appointed guardian, filed a complaint against Evenflo asserting claims of strict liability, negligence, liability for failure to provide post-sale warnings, post-sale failure to warn as the successor, negligence per se, aiding and abetting, conspiracy, joint venture, and successor liability. Gariby contended the child seat was defective and unreasonably dangerous, and the labeling did not adequately warn users of the seat's hazards and could fall off or become unreadable over time. The trial

court granted summary judgment to Evenflo on the successor liability, strict liability, and negligence claims.[1] The remaining claims of successor liability for post-sale failure to warn, aiding and abetting, civil conspiracy, and joint venture were based largely on the allegation that Evenflo and Gerry had conspired in the APA to hide defects in the child seat. The court later entered summary judgment in favor of Evenflo on those claims as well, and this appeal followed.

Discussion

Discovery

¶5 Gariby argues the trial court abused its discretion by denying Gariby's motion to compel Evenflo to produce all documents and depositions from another case involving the same child safety seat. She contends those documents "were discoverable and [Gariby] was unduly prejudiced by the ruling refusing production." We will not disturb a court's ruling in matters of discovery absent an abuse of its broad discretion. *Link v. Pima Cnty.*, 193 Ariz. 336, ¶ 3, 972 P.2d 669, 671 (App. 1998).

¶6 Gariby argues the "hazardous design" alleged in the other case was the same design at issue in this case. Relying on *Gosewisch v. American Honda Motor Co.*, the trial court found Gariby had "failed to demonstrate the accidents in the two [actions] are similar or even that the contested theories of liability . . . are similar."[2] 153 Ariz. 389,

[1]These claims are not at issue in this appeal.

[2]At oral argument, Gariby contended *Gosewisch* was irrelevant to this case because the issue was not whether the accidents were similar, but whether the APA negotiation was common to both cases. However, because Gariby argues in her briefs on

737 P.2d 365 (App. 1985), *vacated in part on other grounds*, 153 Ariz. 400, 737 P.2d 376 (1987). *Gosewisch* held that a court did not abuse its discretion by limiting discovery to cases involving "similar accidents caused by the same or similar models." *Id.* at 394-95, 737 P.2d at 370-71. Gariby does not identify any legal authority contradicting *Gosewisch*. Instead, Gariby argues it is sufficient that both actions involve the same child safety seat.[3] However, *Gosewisch* rejected the argument that plaintiffs are entitled to discover information from all accidents involving the same product. *Id.* at 394, 737 P.2d at 370.

¶7 Although Gariby argues both cases "relate to the APA," nothing in the record supports Gariby's allegation at oral argument that there were additional undisclosed documents relating to the APA negotiation. Gariby conceded this point at oral argument. Gariby does not dispute that Evenflo produced documents from the previous litigation regarding the APA's negotiation and execution. In fact, Gariby's motion to compel did not seek to enforce her specific requests for production of APA-related documents as was suggested at oral argument; rather, it sought to enforce her separate request for all documents and depositions from the previous litigation. Gariby

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appeal that the accidents were similar due to the design of the child seat, we address both arguments in turn.

[3]In her reply brief, Gariby contends the accidents were similar because in both cases an impact combined with a defective design to cause an injury. However, she does not dispute the trial court's finding that the accidents were dissimilar because the previous litigation involved a child over forty pounds who was ejected from the seat and did not involve a theory of inadequate warning labels. Additionally, we are not required to address arguments raised for the first time in a reply brief. *See Romero v. Sw. Ambulance*, 211 Ariz. 200, n.3, 119 P.3d 467, 471 n.3 (App. 2005).

has failed to explain adequately why the trial court erred by denying her more broad request. Therefore, we cannot conclude the court erred in denying Gariby's request for production. *See Link*, 193 Ariz. 336, ¶ 3, 972 P.2d at 671.

Summary Judgment

¶8 Summary judgment is appropriate when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Ariz. R. Civ. P. 56(c)(1). A trial court should grant a motion for summary judgment "if the facts produced in support of the claim or defense have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense." *Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990). "On appeal from a summary judgment, we must determine de novo whether there are any genuine issues of material fact and whether the trial court erred in applying the law." *Bothell v. Two Point Acres, Inc.*, 192 Ariz. 313, ¶ 8, 965 P.2d 47, 50 (App. 1998).

Successor Liability for Post-Sale Failure to Warn

¶9 Gariby argues Evenflo, as Gerry's successor, owed a duty to users to issue post-sale warnings including about the seat's weight guidelines, even if it did not assume Gerry's liabilities in the APA. She contends Evenflo could have issued warnings through the public media, as is its normal business practice, and there is a genuine issue of material fact as to whether a reasonable person in Evenflo's position would have done so. The trial court determined there was no evidence demonstrating a reasonable person in the position of Evenflo, as Gerry's successor, would have provided a post-sale warning to

potential secondary purchasers. The court noted there was no allegation that the original warnings given were inadequate and the testimony relied on by Gariby either did not pertain to Gerry products or did not indicate there was a problem with Gerry's labeling.

¶10 Gariby bases her argument on the Restatement (Third) of Torts (Products Liability) § 13 (1998), which states:

> (a) A successor corporation or other business entity that acquires assets of a predecessor corporation or other business entity . . . is subject to liability for harm to persons or property caused by the successor's failure to warn of a risk created by a product sold or distributed by the predecessor if:
>
> > (1) the successor undertakes or agrees to provide services for maintenance or repair of the product or enters into a similar relationship with purchasers of the predecessor's products giving rise to actual or potential economic advantage to the successor, and
> >
> > (2) a reasonable person in the position of the successor would provide a warning.
>
> (b) A reasonable person in the position of the successor would provide a warning if:
>
> > (1) the successor knows or reasonably should know that the product poses a substantial risk of harm to persons or property; and
> >
> > (2) those to whom a warning might be provided can be identified and can reasonably be assumed to be unaware of the risk of harm; and
> >
> > (3) a warning can be effectively communicated to and acted on by those to whom a warning might be provided; and
> >
> > (4) the risk of harm is sufficiently great to justify the burden of providing a warning.

¶11 Apparently presuming Restatement § 13 is controlling authority, the trial court determined there was a genuine issue of material fact as to the service requirement in subsection (a)(1) because Evenflo had agreed to service warranty claims on Gerry's products, but there was no evidence to establish a genuine issue of material fact that a reasonable person in Evenflo's position would have issued post-sale warnings under subsection (b).

¶12 Assuming without deciding Restatement § 13 applies,[4] we agree with the trial court that Gariby failed to present evidence establishing a genuine issue of material fact under subsection (b). Gariby contends the record contained evidence Evenflo knew or should have known, as required by Restatement § 13(b)(1), that the Double Guard posed a risk of harm and the warning labels were insufficient. In support of its argument Evenflo knew the warning labels peeled or fell off the child seats, Gariby cites the testimony of Gary Whitman from another case. But Whitman testified about problems with labels used by Evenflo and did not indicate those labels were the same or similar as those used with Gerry's products. Consequently we agree with the trial court that there

[4]In the absence of contrary Arizona law, generally we follow the Restatement. *In re Krohn*, 203 Ariz. 205, ¶ 18, 52 P.3d 774, 779 (2002). However, we will not do so blindly "'when to do so would result in the recognition of a new cause of action in this jurisdiction.'" *Ramirez v. Health Partners of S. Ariz.*, 193 Ariz. 325, ¶ 26, 972 P.2d 658, 665 (App. 1998), *quoting Reed v. Real Detective Publ'g Co.*, 63 Ariz. 294, 303, 162 P.2d 133, 138 (1945). Arizona recognizes successor liability for harm caused by defective products sold by its predecessor in some circumstances, consistent with the Restatement (Third) of Torts (Products Liability) § 12 (1998). *See Winsor v. Glasswerks PHX, L.L.C.*, 204 Ariz. 303, ¶ 15, 63 P.3d 1040, 1045 (App. 2003). But Gariby has not provided us with any authority suggesting Restatement § 13 has been adopted in Arizona or that Arizona otherwise recognizes liability for a successor's post-sale failure to warn.

was no evidence presented that "Evenflo's experience with its own labels coming off its booster seats is the same or similar to Gerry Products."

¶13 Gariby also cites the testimony of Robert Potter from another case, but his testimony did not indicate specific knowledge of hazards associated with the Double Guard, and he made no mention of problems with labels on Gerry's products. And the incident and testing reports Gariby cited demonstrating Evenflo's knowledge did not pertain to labeling problems and did not indicate the prior accidents identified were similar to Gariby's. Therefore, there was no basis to conclude a reasonable person in Evenflo's position had reason to know of a substantial risk of harm unaddressed by the existing warning labels. *See* Restatement § 13(b)(1).

¶14 Restatement § 13(b)(2) requires that "those to whom a warning might be provided can be identified and can reasonably be assumed to be unaware of the risk of harm." Gariby asserts "those needing a warning are easily identified as any user of the child safety seat," but does not explain how those specific users could be identified. *See* Restatement § 13 cmt. b ("[W]hen the successor has established no systematic relationships with the predecessor's customers through service contracts, usually the successor has no practical method of identifying those customers and communicating effectively with them."). And to support its assertion that it can be assumed such users would be unaware of the risks, Gariby again cites the faulty label problems we discussed above. Additionally, there is no evidence a warning could have been communicated effectively as required by Restatement § 13(b)(3). Although Gariby suggests Evenflo could have used the public media, it has not cited to any evidence suggesting such a

warning would have been effective and "acted on by those to whom a warning might be provided." *See id.* Therefore, the trial court did not err in granting summary judgment against Gariby on her claim of successor liability for post-sale duty to warn.[5]

Conspiracy, Aiding and Abetting, Joint Venture[6]

¶15 Gariby argues there is a genuine issue of material fact as to whether Evenflo conspired with Gerry to conceal the child seat's dangers. A claim for civil conspiracy requires that "'two or more people must agree to accomplish an unlawful purpose or to accomplish a lawful object by unlawful means, causing damages.'" *Wells Fargo Bank v. Ariz. Laborers, Teamsters & Cement Masons Local No. 395*, 201 Ariz. 474, ¶ 99, 38 P.3d 12, 36 (2002), *quoting Baker v. Stewart Title & Trust of Phx.*, 197 Ariz. 535, ¶ 30, 5 P.3d 249, 256 (App. 2000). The agreement must be established by clear and convincing evidence. *Id.* ¶ 100.

¶16 Gariby's claim for conspiracy is based on the agreement in the APA that Gerry would indemnify Evenflo for damages arising from Double Guards shipped within sixteen months of the APA closing date provided Evenflo did not "recall, issue any safety advisory or take any other corrective action with respect to such products without the written consent of [Gerry]." This is not an agreement or promise by Evenflo not to recall

[5]Because we determine no additional warning was required, we need not address whether "the risk of harm is sufficiently great to justify the burden of providing a warning," Restatement § 13(b)(4), but recognize, as does Evenflo, that the harm suffered by Gariby was great.

[6]Although Gariby conceded at oral argument she failed to carry her burden on the conspiracy and aiding and abetting claims, we nonetheless address the arguments raised in her briefs.

or issue any advisory as Gariby asserts. And an agreement that is merely suspicious does not rise to the level of clear and convincing evidence of a conspiratorial arrangement. *See id.* Gariby's construction of this provision of the APA has no support and cannot give rise to a genuine issue of material fact as to whether Evenflo conspired with Gerry.

¶17 Gariby similarly argues there is a genuine issue of material fact as to whether Evenflo aided and abetted Gerry in concealing the child seat's dangers. A claim for aiding and abetting requires proof of three elements:

> (1) the primary tortfeasor must commit a tort that causes injury to the plaintiff;
>
> (2) the defendant must know that the primary tortfeasor's conduct constitutes a breach of duty; and
>
> (3) the defendant must substantially assist or encourage the primary tortfeasor in the achievement of the breach.

Id. ¶ 34.

¶18 Gariby contends the first element is satisfied because "Gerry's concealment of the hazards posed by the Double Guard child safety seat and not issuing post-sale warnings to primary purchasers and secondary users rises to the level of a tort recognized in Arizona." But Gariby has not cited to any evidence Gerry concealed the seat's dangers, nor has Gariby established that Gerry was required to issue a post-sale warning.

¶19 Gariby also contends the second element is satisfied because Evenflo knew of the hazards but agreed not to conduct a recall or issue an advisory. Gariby has not provided any evidence Evenflo knew about problems with Gerry's labels. Moreover, Evenflo did not agree with Gerry not to issue a recall or advisory. Rather, Gerry agreed

to indemnify Evenflo for damages arising from Double Guards shipped within sixteen months of the APA closing date provided Evenflo did not issue a recall or advisory without Gerry's consent. And the proper inquiry is not Evenflo's knowledge of problems with the child seat or its labels, but Evenflo's knowledge that Gerry's conduct constituted a breach of its duty. *See id.* That assertion similarly is unsupported.

¶20 Gariby also has failed to establish the third element. She contends the APA made it easier for Gerry to conceal the child seat's hazards. But the section of the APA to which Gariby refers merely indemnifies Evenflo for claims related to Double Guards shipped within sixteen months of the closing date of the APA. We cannot say Gerry's agreement to indemnify Evenflo constitutes Evenflo substantially assisting or encouraging Gerry's breach of a duty it owed to secondary users. *See id.* Because Gariby failed to present evidence that could satisfy the elements of an aiding and abetting claim, the trial court did not err in granting summary judgment on that claim.

¶21 Last, Gariby contends there is a genuine issue of material of fact as to whether Evenflo and Gerry's relationship constituted a joint venture. The elements of a joint venture are: "(1) an agreement, (2) a common purpose, (3) a community of interest, (4) an equal right of control, and (5) participation in profits and losses." *Estate of Hernandez v. Flavio*, 187 Ariz. 506, 509, 930 P.2d 1309, 1312 (1997).

¶22 This claim is also based on the same provision in the APA. Gariby asserts Evenflo and Gerry had a "special relationship" based on a "mutual understanding and agreement . . . to hide the dangers posed by the Double Guard." As we have already stated, the APA does not contain such an agreement. And Gariby has not explained how

each of the elements of a joint venture otherwise are met. Therefore, we agree with the trial court that Gariby "fail[ed] to articulate specifically and factually how the APA satisfies each element of a joint venture with regards to the Double Guard," and thus the court did not err in entering summary judgment in favor of Evenflo on Gariby's joint venture claim.

Disposition

¶23 For the foregoing reasons, we affirm.

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge